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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LOUIS HERNANDEZ,

Defendant and Appellant.

E072790

(Super.Ct.No. FSB12071)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Michael P. Pulos and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant, Michael Hernandez, was convicted by a jury in 1998 of first degree murder (Pen. Code, § 187, subd. (a))<sup>1</sup>, attempted premeditated murder (§§ 664, 187, subd. (a)), and two counts of first degree robbery in concert (§§ 211, 213) during which a principal was armed (§ 12022, subd. (a)(1)) and defendant personally used a weapon (§ 12022.5, subd. (a)). Defendant was sentenced to a total determinate term of 16 years, plus indeterminate terms of 25 years to life with the possibility of parole for murder and life with the possibility of parole for attempted murder. He appeals, contending the trial court erred in denying his section 1170.95 petition, arguing defendant made a prima facie showing of his eligibility for relief. We disagree and affirm the trial court's judgment.

## BACKGROUND

Many of the following facts are taken directly from our opinion on defendant's appeal in *People v. Hernandez* (Apr. 2, 1998, E020326) [nonpub. opn.].<sup>2</sup>

During the evening of August 26, 1996, Antonio Reyes (Reyes) and Raymond Herman Jaramillo (Jaramillo) visited Yvonne Mendez (Mendez) at her home in Colton. Her home was within the "turf" of the North Side Colton (NSC) gang. Reyes and Jaramillo were not NSC gang members. While at Mendez's home, Reyes and Jaramillo met Daniel Lopez (Lopez) and Kirk Lozolla (Lozolla), who claimed to be NSC gang

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Penal Code.

<sup>2</sup> We previously took judicial notice of the record from the direct appeal. Facts not taken from *People v. Hernandez, supra*, E020326 include citations to the record.

members. Reyes and Jaramillo left Mendez's home and returned later that same evening around midnight. Lopez and Lozolla were there, and within a short time, defendant and Jesse Perez (Perez), who were also NSC gang members, arrived. Lopez, Lozolla, Perez and defendant entered the bedroom where Reyes and Jaramillo were with Mendez. Reyes told them he and Jaramillo were going to leave. In response, the four men pulled out their guns and one of them said, "you punks aren't going nowhere yet." Reyes and Jaramillo were told to empty their pockets, which they did. Jaramillo took out his wallet containing \$2, keys, a baggie of marijuana, and a pipe. Reyes removed his wallet, a pager, and a pen. Reyes and Jaramillo were searched for weapons and none were found. They were then kicked, beaten, forced outside, and told if they returned to Colton they would be killed. Someone then told them to "start running and never come back." As Reyes and Jaramillo ran, Lopez, Lozolla, Perez and defendant fired their guns at Reyes and Jaramillo. Reyes was hit and fell. Jaramillo was also hit but continued to run. As he ran, he looked back and saw the four men standing with their gun muzzles flashing.

Defendant was charged with first degree murder (§ 187, subd. (a), count 1), attempted premeditated murder (§§ 664, 187, subd. (a), count 2), and two counts of first degree robbery in concert (§§ 211, 213, counts 3 and 4), during which a principal was armed (§ 12022, subd. (a)(1)) and in which defendant personally used a weapon (§ 12022.5, subd. (a)).

At trial, Mendez testified Lozolla, defendant and Perez were three of the four men who entered her room and kicked Jaramillo and Reyes. They had guns, according to

Mendez, and defendant pushed Jaramillo against the wall. Mendez testified she left her home and went next door when the fighting started. When she returned, she saw Lozolla, Perez, and Lopez, but not defendant, take Jaramillo and Reyes outside. Mendez also testified she saw Lopez and Perez walk up to Reyes's fallen body and shoot him in the head. Reyes died from gunshots to his head, chest and abdomen.

The jury was instructed that they could find defendant guilty of first degree murder on two alternate theories, felony murder and willful, deliberate, premeditated murder. During closing argument, the People first addressed defendant's guilt under a theory of felony-murder. Then, the People addressed defendant's guilt under the theory of willful, deliberate, premeditated murder. The jury was not asked to specify under which theory they found defendant guilty.

The jury convicted defendant of first degree murder (§ 187, subd. (a)), attempted premeditated murder (§§ 664, 187, subd. (a)), and two counts of first degree robbery in concert (§§ 211, 213). With respect to the murder count, the jury found true the allegation that defendant personally used a firearm (§ 12022.5, subd. (a)), as well as the fact that during the commission of that crime, a principal was armed (§ 12022, subd. (a)(1)). Defendant was sentenced to a total determinate term of 16 years, plus indeterminate terms of 25 years to life for the murder and life with the possibility of parole for attempted murder.

On April 2, 1998, in an unpublished opinion on defendant's direct appeal, we modified the sentence and ordered the abstract of judgment modified to reflect the

determinate term of 13 years 4 months for robbery and the gun use enhancement, rather than 14 years 4 months, but otherwise affirmed the trial court's judgment. (*People v. Hernandez, supra*, E020326.)

On February 1, 2019, defendant filed a petition for resentencing pursuant to section 1170.95. On March 25, 2019 the People filed a motion to strike the petition challenging the constitutionality of section 1170.95 and filed an informal response arguing defendant was ineligible for relief under 1170.95 and asked the court take judicial notice of portions of the trial record and of *People v. Hernandez, supra*, E020326. That same day, defendant was appointed a conflicts panel attorney.

On March 28, 2019 the court found defendant ineligible for relief under section 1170.95 stating "that he was an active participant, although, not the active killer. He took a major part in the application that the conduct of that resulted in the death." The court also stated, "I do think the actions in this were reckless." The court stated its decision was based on its review of our *People v. Hernandez, supra*, E020326 opinion and the trial court's own recollection of the case. The trial court declined to rule on the People's constitutionality argument.

On May 16, 2019 defendant appealed.

## **DISCUSSION**

Defendant contends that he is eligible for relief under section 1170.95 and that he made the required prima facie showing, therefore the trial court erred in denying his section 1170.95 petition for relief. We disagree.

Section 1170.95, enacted pursuant to Senate Bill 1437, which became effective on January 1, 2019, provides a multi-step process by which a person convicted of felony murder or murder under a natural and probable consequences theory may file a petition to have the petitioner's murder conviction vacated and to be resentenced on the remaining counts. However, the petitioner must first meet the following conditions to be eligible for relief under 1170.95: “(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.” (§ 1170.95, subd. (a)(1)(2)(3).)

The issue of whether defendant is eligible for relief under section 1170.95 requires the construction and interpretation of a statute, which is a question of law that we review de novo. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) Where a defendant makes a motion, application or petition for which a prima facie case must be established, the appellate court reviews the record de novo. (*People v. Bonilla* (2007) 41 Cal. 4th 313, 342 [discussing the review of prima facie cases in *Wheeler/Batson* motions].) After all, whether a prima facie case has been established is a question of law. (*Maas v. Superior*

*Court* (2016) 1 Cal.5th 962, 977 [so stating in the context of petitions for writ of habeas corpus].)

“Senate Bill 1437 was enacted to ‘amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.’” (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723, quoting Stats. 2018, ch. 1015, § 1, subd. (f).) “Substantively, Senate Bill 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability.” (*Ibid.*) Section 1170.95, enacted as part of Senate Bill 1437, “allows those ‘convicted of felony murder or murder under a natural and probable consequences theory . . . [t]o file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts . . . .’” (*Ibid.*, citing § 1170.95, subd. (a).)

Relevant here, section 188, subdivision (a)(3), now states: “Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.” Subdivision (e) of section 189 now states: “A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: [¶]

(1) the person was the actual killer; [¶] (2) the person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of the murder in the first degree; [¶] (3) the person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of section 190.2.”

Section 1170.95 provides a multi-step process by which defendants may file petitions for resentencing relief. If the defendant meets all the criteria in subdivision (a) of section 1170.95 which sets out the initial criteria for eligibility, then defendant must follow the procedure set out in section 1170.95, subdivision (b), for filing the petition. The petition needs to include all of the following: “(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a). [¶] (B) The superior court case number and year of the petitioner’s conviction. [¶] (C) Whether the petitioner requests the appointment of counsel.” (§ 1170.95, subd. (b).)

Upon filing of a petition with the requisite information set out in section 1170.95, subdivision (b), “[t]he court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section . . . . If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.” (§ 1170.95, subd. (c).) If the order to show cause is issued, then the court must hold a hearing to determine whether to



vacate the murder conviction and to recall the sentence and resentence the defendant on any remaining counts. (§ 1170.95, subd. (d)(1).)

Although section 1170.95 does not specify what is needed for a prima facie showing, the standard is equivalent to that for issuance of an order to show cause in a habeas proceeding. (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 327.) In other analogous contexts, courts have held that a prima facie showing for resentencing normally requires the petitioner “to present evidence of facts” to show he or she falls within the resentencing provision. (*People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095.)

Thus, a prima facie showing requires a petition “state fully and with particularity the facts on which relief is sought” and “include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations.” (*People v. Duvall* (1995) 9 Cal.4th 464, 474 [explaining prima facie burden in habeas corpus petitions].) Conclusory allegations without any explanation of the basis for the allegations are not enough for a prima facie showing. (*Ibid.*, citing *People v. Karis* (1988) 46 Cal.3d 612, 656.) In evaluating whether a defendant made a prima facie showing in his section 1170.95 petition, the court may access all the readily ascertainable information such as, documents in the court file or otherwise part of the record of conviction. (*People v. Verdugo, supra*, 44 Cal.App.5th 320, 329.) “A court of appeal opinion, whether or not published, is part of the [defendant’s] record of conviction. (*Id.* at p. 333.)

Here, defendant's petition for relief under section 1170.95 was three pages in total length. It consisted of checked off boxes next to prewritten statements regarding the eligibility for relief under section 1170.95. There were no declarations, affidavits, or trial transcript portions attached. There was also no explanation of eligibility beyond the checked boxes and prewritten sentences. Although defendant's petition met the requirements under section 1170.95 subdivision (b), it failed to "state fully and with particularity the facts on which relief is sought" or "include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations" needed for defendant to overcome the prima facie requirement of section 1170.95, subdivision (c). (See *People v. Duvall*, *supra*, 9 Cal.4th 464, 474.) Instead, by merely checking off boxes on a form, defendant did nothing more than make conclusory allegations. (*Id.* at p. 474.) Therefore, defendant did not make a prima facie showing of his eligibility for relief under section 1170.95 and the trial court did not err in denying defendant's petition.

Moreover, the trial court noted that it had an independent recollection of the case as having presided over the trial. Using its own recollection and our opinion in *People v. Hernandez*, *supra*, E020326, the trial court determined that defendant was ineligible for relief under section 1170.95 because "he was an active participant . . . [and] . . . took a major part in the application that the conduct of that resulted in the death," and the actions were reckless.

We agree, and the record supports the trial court's conclusion that defendant was an active participant: The jury made a true finding that defendant personally used a weapon (§ 12022.5, subd. (a)) in the commission of the first degree murder. This is tantamount to an express finding that defendant was an active participant in the murder, and that he was not convicted under a natural and probable consequences theory. Defendant was convicted on a valid theory of murder which survived the changes to sections 188 and 189 made by Senate Bill 1437.

Thus, pursuant to section 189, subdivision (e)(3), defendant was found guilty of murder because defendant was a major participant and his actions were reckless, per the trier of fact's determination. As an active participant, defendant was precluded from relief under section 1170.95, subdivision (a)(3). Defendant was properly convicted of murder, notwithstanding the statutory changes to section 189. Therefore, defendant is not eligible for relief. As such, the trial court did not err in denying defendant's petition for resentencing pursuant to section 1170.95.

#### **DISPOSITION**

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

MILLER  
J.

FIELDS  
J.